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Conceptual Paper

Norms and Applications of the Combination of Contracts and Promises (*Wa'ad*) in *Musyarakah Mutanaqisah* Contracts

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Abstract

This paper examines the norms and application of the combination of contracts (*uqd*) and promises (*wa'ad*) in *Musyarakah Mutanaqisah* contracts. The study uses a qualitative method, with a deductive-normative approach to assess the legal standing of these concepts within *Musyarakah Mutanaqisah*. The research focuses on current conditions and uses secondary data such as books and legal regulations. *Uqd* refers to contracts involving mutual agreement through *ijab* and *qabul*, whereas *wa'ad* is a promise from one party to perform an act in the future. In Musyarakah Mutanaqisah agreements, these two concepts are applied together to facilitate the gradual transfer of asset ownership. The study finds that while *wa'ad* is not legally binding, it plays a significant role in ensuring adherence to Shariah principles while meeting business needs. The paper highlights the importance of understanding these concepts in the context of Islamic financial contracts.

Keywords: *Uqd*; *Wa'ad*; *Musyarakah Mutanaqishah* Contracts; Islamic Finance; Islamic Law

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Introduction

The growth of the Islamic finance industry in Indonesia has led to the creation of various financial products designed to strengthen its position and role, both in terms of providing legal certainty and ensuring operational efficiency, competitiveness, and profitability (Mubarok & Hasanuddin, 2017b, p. 14).

Promises (*wa'ad*) and agreements (*uqd*) are two technical terms that are interesting to discuss, as they both stem from the same root concept—promises—but are understood differently from a legal perspective, particularly in terms of their binding nature (Mubarok & Hasanuddin, 2017b, p. 11).

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The interpretation of agreements is governed by Articles 1342-1351 of the Indonesian Civil Code (KUHPerdata), which stipulates that agreements made between parties must be understandable and clear in their content. However, in practice, many contracts contain terms that the parties do not fully understand (Hariri, 2011, p. 128).

A promise or mutual promise (*wa'ad/muwa'adah*) is not the same as a contract (*uqd*), though it may resemble one. An *uqd*, in principle, involves *ijtima' al-iradatain* (the mutual agreement of both parties), with some exceptions, such as *uqd tabarru'* (gratuitous contracts), which can still be considered valid without mutual agreement (Mubarok & Hasanuddin, 2017b, pp. 14–18).

Comparing this to Indonesia's positive law, *wa'ad* is analogous to a promise or a party's declaration of commitment to perform or refrain from a certain act, whereas an *uqd* is equivalent to a contract—a legal event in which one party promises another party or two parties mutually agree to fulfill certain obligations.

In the realm of Islamic finance and business transactions, the *Musyarakah Mutanaqisah* contract has emerged as a contemporary innovation. This contract blends the values of *musyarakah* (partnership) in Shariah with the rapidly evolving needs of business instruments. It was first formulated and introduced by Islamic scholars in the 20th century, specifically in 1997, during discussions at the Majma' Fiqhi (Islamic Fiqh Academy). Kamal Taufiq Muhammad Khatab explains that the concept of *musyarakah mumtahiyyah bi al-tamlik* (a partnership ending in ownership) aligns with *Musyarakah Mutanaqisah* (Hathab, 2003).

Methods

The study employs a qualitative research method, often termed naturalistic research, as it is conducted in a natural setting where phenomena are observed without manipulation, ensuring the object's conditions remain unchanged before, during, and after the research (Saebani, 2015, p. 233). This research is complemented by a deductive-normative strategy, aiming to ascertain the legal standing of specific laws within a legal framework (Umar, 2014, p. 22). The research is descriptive, focusing on illustrating current conditions and investigating the causes of particular phenomena, specifically examining the combination of contracts (*uqd*) and *wa'ad* in the context of *Musyarakah Mutanaqisah*. The study utilizes qualitative data for detailed explanations and descriptions, including general perspectives on *uqd, wa'ad* and *muwa'adah*, legal perspectives on *wa'ad,* and their practical applications. Secondary data sources, such as books, academic journals, and legal regulations, provide the basis for this scientific inquiry.

Results and Discussion

General Overview of *Uqd*, *Wa'ad*, and *Muwa'adah*

In Islamic law, the term *uqd* is derived from the Arabic word *ar-rabbth*, meaning a "bond" or "tie." More specifically, *uqd* refers to *ijab* (offer) and *qabul* (acceptance), which establish rights and obligations concerning the subject matter of the contract. This specific interpretation is favored by the Hanafis. In general, the term *uqd* implies the occurrence of *ijab* and *qabul* (mutual consent) unless there is a different indication (Sahroni & Hasanudin, 2016, pp. 4–5).

Broadly, *uqd* can be defined as any action that creates, transfers, modifies, or terminates rights, whether it involves one or two parties. This general definition is supported by the Malikis, Shafi'is, and Hanbalis (Sahroni & Hasanudin, 2016, p. 5). In technical terms, *uqd* represents the connection between *ijab* and *qabul*, in line with Shariah (the will of Allah and His Messenger), which brings about legal consequences on the object of the contract (Az-Zuhaili, 1989, p. 2918).

In Islamic law, agreements or obligations can be categorized as *uqd* based on mutual consent and their alignment with Islamic principles. *Ijab* and *qabul* are essential elements of every transaction in an Islamic context (Soemitra, 2019, p. 39).

Regarding the legality of transactions, scholars have differing views. The Zahiris (literalists) argue that all transactions (*uqd*) are originally prohibited unless there is specific evidence (*dalil*) that permits them. For a contract to be valid, it must be based on authentic Shariah texts or *ijma* (consensus of scholars). The Zahiris maintain that only contracts explicitly found in classical jurisprudential texts (*fiqh*) are permissible, and no new types of contracts can be created. This view is derived from their strict interpretation of textual evidence (Sahroni & Hasanudin, 2016, pp. 13–15).

In contrast, the majority of scholars believe that transactions are generally permissible as long as they do not violate the basic principles of Islamic commercial law (*mu'amalat*). They base their view on the obligation to fulfill promises, as outlined in Surah Al-Maidah, verse 1, which broadly mandates the fulfillment of contracts without specifying types. Transactions are considered part of *mu'amalat* (worldly dealings), rather than *ibadah* (acts of worship), and the guiding principle in *mu'amalat* is *al-ashlu fil mu'amalat al-ibahah* (the default rule in commercial dealings is permissibility). Scholars such as the Hanafis, Malikis, Shafi'is, and Hanbalis argue that contracts must adhere to the Quran, Hadith, *ijma'*, *qiyas* (analogical reasoning), and other legal sources. Therefore, contracts based on *urf* (custom) and *qiyas* are permitted, whereas contracts lacking evidence from the texts or analogical reasoning are not allowed (Thohir, 2010, p. 106).

The Hanbalis, especially Ibn Taymiyyah and Ibn Qayyim, adopt a more flexible approach. They hold that as long as there is no explicit prohibition in Shariah against

a particular contract, it is permissible. Thus, it is lawful to create new types of contracts as long as they fulfill a legitimate purpose (*mashlahat*) and do not conflict with Shariah principles (Sahroni & Hasanudin, 2016).

These differing views reflect the varying interpretations among scholars regarding the permissibility and formation of contracts in Islamic jurisprudence, ranging from a literal approach to a more principle-based, flexible understanding.

In Islamic jurisprudence, the term *al-wa'd* (promise) refers to a commitment made by a person or party to perform or refrain from a particular act. Unlike a contract (*uqd*), which involves mutual consent through *ijab* (offer) and *qabul* (acceptance), a promise is unilateral, involving only the offer without the other party's acceptance (Mubarok & Hasanuddin, 2017b, pp. 11–12).

Linguistically, *al-wa'd* can also mean *hadda* (threat) and *takhawwafa* (to frighten), though it typically refers to a commitment to a positive action. In Islamic legal discourse, two related terms from the same root are used: *al-wa'd* and *al-'uddah*, both indicating a future-oriented promise (Mubarok & Hasanuddin, 2017b, p. 12).

From a terminological standpoint, scholars emphasize that *al-wa'd* involves a declaration by a person or legal subject to do or refrain from doing something in the future, typically involving a good action. While there is a moral obligation to fulfill promises, the legal enforceability of promises has been debated among scholars (Mubarok & Hasanuddin, 2017b).

The majority of Islamic jurists, including those from the Hanafi, Shafi'i, and Hanbali scholars, as well as a segment of the Maliki scholars, maintain that promises are morally binding but not legally enforceable. This position views promises as part of charitable actions (*tabarru'*), akin to gifts (*hibah*), which are not legally binding unless formalized (Mubarok & Hasanuddin, 2017b). However, a group of scholars, including Ibn Shubrumah, Ishaq Ibn Rahawaih, Al-Hasan al-Basri, and a minority opinion within the Maliki scholars, argue that promises are legally binding and can be enforced in a court of law (Thohir, 2010, p. 551).

Some Maliki scholars further suggest that a promise becomes legally binding if it is tied to a specific cause, even if the cause is not explicitly mentioned at the time the promise is made. Another prominent view within the Maliki school holds that a promise is enforceable when it is linked to a cause, provided that the cause is clearly stated in the promise.

The majority view holds that promises are religiously binding but not legally enforceable, unless specific conditions are met. The Maliki scholars, which provides more detailed conditions, supports the legal enforceability of promises under certain circumstances. This opinion has been widely accepted by contemporary scholars and institutions, including the Majma' al-Fiqh al-Islami during its 1988 conference in

Kuwait. The same position is endorsed by Islamic banking practices, as evidenced by the Fatwa of the National Sharia Council-Indonesian Ulama Council (Dewan Syariah Nasional Majelis Ulama Indonesia abbreviated DSN-MUI in Bahasa Indonesia) No. 85/DSN-MUI/XII/2012, which addresses promises (*wa'd*) in Shariah-compliant financial and business transactions.

Promises or mutual promises (*wa'd/muwa'adah*) are distinct from contracts (*uqd*), although they share similarities for several reasons. Firstly, contracts generate actual rights and obligations, whereas promises do not necessarily fulfill the primary objective of a contract, which is termed *munajjaz*. Secondly, the effectiveness of a contract is immediate and is determined by whether its conditions and requirements are met. In contrast, promises generally pertain to future actions, as they express a commitment from a party to undertake something at a later time. Therefore, legal actions arising from a contract are effective at the time the contract is made, while legal actions stemming from promises lack immediacy since they are contingent upon future performance.

Additionally, contracts are governed by the principles of *al-kharaj bi al-dhaman* (the obligation corresponds with rights) and *al-ghurm bi al-ghurm* (profits are tied to risks). Based on these three points, it can be asserted that there are similarities between *muwa'adah* (particularly *wa'd bi syarth*) and contracts in terms of their nature. Both promises and contracts are binding (*mulzim*), meaning that a party in default can be compelled to comply with the agreement if the necessary conditions are met, thus ensuring legal certainty.

However, promises and contracts differ significantly in their effectiveness. In a contract, ownership of the subject matter is transferred (*intiqal al-milkiyyah*), along with the rights and interests of the parties involved, and there is a correlation between the right to earn profits and the obligation to bear losses. Thus, it is appropriate to state that contracts are not equivalent to promises or mutual promises (*wa'd/muwa'adah*), as the differences far outweigh the similarities (Mubarok & Hasanuddin, 2017b).

The majority of scholars agree that *muwa'adah* is permissible when the status of the promise is non-binding. For instance, a promise related to currency exchange (*sharf*) is non-binding, meaning that neither party is obligated to buy or sell foreign exchange. This non-binding nature is significant because if *muwa'adah* were binding, its substance would be equivalent to that of a contract. Consequently, a binding promise for a foreign exchange transaction would be impermissible, as it would entail a cashless exchange, which is prohibited under the principles regarding *riba al-yad* (Sahroni & Hasanudin, 2016, p. 10).

The Application of Combining Contracts (*Uqd*) and Promises (*Wa'ad*) within The Framework of *Musyarakah Mutanaqishah*

From an etymological perspective, *syirkah* (or *sharikah*) refers to a partnership or collaboration among several partners or shareholders. In a terminological context, it describes an association in the ownership of rights to conduct *tasharruf* (the utilization of assets). The majority of Islamic jurists (fuqaha) agree that *syirkah* transactions are permissible but not obligatory (binding). However, Ibn Yunus, from the Maliki scholars, contends that *syirkah* becomes obligatory once a transaction occurs, and neither party may withdraw, similar to a sale transaction (Khairi, 2017, pp. 225–228).

Musyarakah Mutanaqisah is a specific form of *musyarakah* or *syirkah*, where the ownership of assets (goods) or capital of one party (the *sharik*) diminishes due to gradual purchases by another party. In the *Musyarakah Mutanaqisah* agreements executed by Islamic financial institutions (abbreviated IFIs), there is also a commitment from the client to purchase the asset from the ownership entity (Sahroni & Hasanudin, 2016, p. 19).

Within the *Musyarakah Mutanaqisah* agreement, there exists a mutual promise where the IFIS commits to sell its *hishshah* (shares or capital portions) to the client gradually, and the client also promises to purchase the bank's *hishshah* incrementally. In this context, the *muwa'adah* (the sales promise from the IFIs and the purchase promise from the client) is not yet a binding agreement but indicates a prior understanding to formalize a contract at a future date. Structurally, the *muwa'adah* resembles an agreement, but substantively, mutual promises do not constitute a formal contract (Mubarok & Hasanuddin, 2017b, p. 13).

This product serves as an alternative to the *murabahah* product, which has been predominantly utilized in Islamic banking. According to the fatwa from DSN-MUI, the aforementioned promise binds both parties, as stated in fatwa of National Sharia Council-Indonesian Ulama Council : "In the *Musyarakah Mutanaqisah* contract, the first party (one of the *shariks*, the IFIs) must buy the renewed *hishshah*, and the second party (the other *sharik*, the client) is obligated to purchase it." (DSN-MUI Fatwa No. 73/DSN-MUI/XI/2008)

The relationship between *wa'ad* and *Musyarakah Mutanaqisah* is evident in the stipulations of the *Musyarakah Mutanaqisah* contract, which comprises both *Musyarakah/syirkah* and sale agreements.

Musyarakah Mutanaqisah constitutes a collaboration between the *shariks* (in this case, the bank and the client) aimed at acquiring a specific asset. Subsequently, this asset is utilized by the client as business capital to generate profits, which will be shared between the bank and the client, alongside the gradual purchase of the bank's asset. Over time, the bank's ownership of the asset decreases. Therefore, this agreement is

referred to as *Musyarakah Mutanaqisah* due to the consideration of the bank's ownership in the *syirkah*, which entails the depreciation of the bank's asset as it is gradually purchased by the client. Here, *mutanaqishah* signifies the diminishing capital of the bank as it is paid for (bought) by the client in installments (Mubarok & Hasanuddin, 2017a, p. 100).

From the client's perspective, the amount of capital goods they possess increases over time as they purchase the bank's asset incrementally. Consequently, from the client's standpoint, this *syirkah* is not a *Musyarakah Mutanaqisah*, but rather a *musyarakah ziyadah* (where *zada* or *ziyadah* means an increase) (Mubarok & Hasanuddin, 2017a).

Musyarakah Mutanaqisah falls within the realm of *al-uqud al-murakkabah* (multi-contracts) as it combines *syirkah* (*syirkah 'inan fi al-amwal*) with sale agreements *('aqd al-bai)* and gifts, which are based on promises or mutual commitments *(al-wa'ad* or *al-muwa'adah).* The framework can be illustrated as follows:

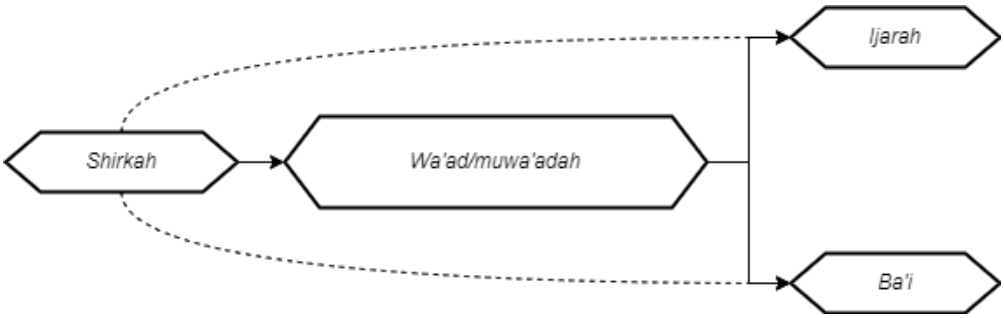

Figure 1. Framework of *musyarakah mutanaqishah* contract

Figure 1 outlines the framework of a *Musyarakah Mutanaqishah* contract. In this arrangement, business partners (*syarik*) enter into a partnership contract (*syirkah*). They also mutually agree to a gradual transfer of ownership of the business capital from one partner to another. To generate income that will be shared, the partners lease or rent out assets to third parties (through an *ijarah* contract). Additionally, partners progressively purchase shares (*hishshah*) in the business capital from other partners using a buy-sell contract.

During the Islamic finance management conference held in Dubai, several schemes for implementing *Musyarakah Mutanaqisah* were discussed, illustrating various models of *al-musyarakah al-muntahiyyah bit tamlik*. One scheme involves a partnership agreement between the bank and the client, where both parties agree to establish a partnership (*syirkah*) by forming business capital in the form of physical assets, along with a mutually agreed profit-sharing ratio (*nisbah*). In this scenario, the physical assets of the partnership can be sold by the bank to the client, by the client to the bank, or collaboratively to a third party after the partnership agreement concludes. However, this model does not align with *al-musyarakah al-muntahiyyah bit tamlik*, as the transfer of ownership does not occur incrementally through sales. This approach

represents the conclusion of the partnership, allowing partners to either retain their ownership of the assets used in the partnership or transfer them through sales, gifts, or other Sharia-compliant means. Scholars generally agree that this particular scheme of *musyarakah-mutanaqishah* is permissible (*ja'iz*), as it avoids any ambiguity by executing both the partnership and sales contracts in parallel (Mubarok & Hasanuddin, 2017a).

Another model features a collaborative business agreement where the bank and the client agree to engage in a joint business venture. Each party contributes assets as business capital, aiming for profit generation. This arrangement stipulates that the client must purchase the bank's assets and also lease the capital assets, generating income in the form of *ujrah* (rent). This scheme highlights key aspects, including the restriction of legal subjects in the sales agreement, with the bank acting as the seller and the client as the buyer. However, the timing of the sale—whether it occurs during or after the partnership—and the payment method, whether cash or installments, remain unspecified. A notable addition to this scheme is the incorporation of a leasing contract (*ijarah*), which clearly delineates the roles of the parties involved: the client as the lessee and the bank as the lessor (Mubarok & Hasanuddin, 2017a).

In another model, the bank and the client participate in a partnership by contributing capital in the form of shares (*hishshah*). Each partner holds a number of shares proportionate to their capital contribution. Partners may sell their shares back to the bank in specified amounts and/or all of their shares to the bank annually, with the payment made either as a lump sum or in installments. When payments are made in installments, the client's capital in the form of shares gradually decreases (*mutanaqishah*) until full ownership transfers to the bank once the client's entire share is paid off (Mubarok & Hasanuddin, 2017a).

Furthermore, there is a partnership involving assets coupled with a commitment to execute a sales transaction for these assets (*al-musyarakah fi 'Ain ma'a al-wa'd bi al-bai*). This model is one of the recommendations from the first Islamic Finance Conference in Dubai. Here, the Islamic financial institution (IFIs) and the client agree to form a partnership with capital represented by tangible assets (such as a house, meeting hall, shop, or vehicle). Each partner's ownership portion is clearly defined in shares (*hishshah*), and they commit (*al-wa'ad*) to sell the capital assets once the partnership concludes. These assets may be sold to one partner (for instance, the client) or to a third party after the partnership agreement ends (Mubarok & Hasanuddin, 2017a).

Lastly, the model of partnership with existing capital enhancement (*al-musyarakah al-mutanaqishah bi tamwil masru' qa'im*) involves a situation where an individual owns a factory but cannot operate it due to incomplete production equipment. The factory owner seeks financing from the IFIs to purchase the necessary equipment for

operation. Upon approval, the partnership framework values the factory owned by the client and the production equipment purchased by the IFIs equally (e.g., each at 100 million), resulting in a 50% ownership stake for each partner, represented in shares (e.g., 200 million shares/*hishshah*). The factory owner commits to gradually purchasing the IFIs capital share, while the IFIs agrees to sell it. As the client's ownership increases through incremental payments, the partnership concludes once the client attains full ownership (100%) (Mubarok & Hasanuddin, 2017a).

Conclusion

The combination of *uqd* (contract) and *wa'ad* (promise) in *Musyarakah Mutanaqisah* demonstrates a unique approach in Islamic financial transactions that seeks to provide legal certainty while maintaining flexibility in its application. While *wa'ad* does not carry the same legal enforceability as *uqd*, the two concepts complement each other in the *Musyarakah Mutanaqisah* agreement. The implementation of this contract reflects adherence to Shariah principles while also accommodating modern business needs, particularly regarding the gradual transfer of asset ownership from the financial institution to the client.

Conflict of Interest

The authors declare no conflict of interest.

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